HENRICK INTERNATIONAL HOTELS & RESORTS PTE LTD

v.

YTL HOTELS & PROPERTIES SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
ABDUL KADIR SULAIMAN JCA
RICHARD MALANJUM JCA
[CIVIL APPEAL NO: W-03-20-1997]
27 MARCH 2003

COMPANY LAW: *Winding-up - Petition - Separate petitions filed under ss. 218(1)(i) and s. 181 of Companies Act - Winding-up order granted prior to hearing of 'oppressive petition' - Whether 'oppressive petition' to be struck out - Whether could be maintained after granting of winding-up order and appointment of liquidator - Companies Act 1965, ss. 181, 218(1)(i), 223 - Rules of High Court 1980, O. 18 r. 19(a), (b), (c) & (d)*

The appellant and the first respondent had formed a joint venture company in which they held equal shareholding equities ('the company'). Following misunderstandings that arose between them, the respondent on 18 October 1995 filed a petition to wind-up the company ('the first petition') under s. 218(1)(i) of the Companies Act 1965 ('the Act'). Subsequently, on 16 January 1996, a petition was also filed by the appellant pursuant to s. 181 of the Act ('the said petition'), seeking for various relief thereunder including for orders that the respondent purchase the appellant's shares in the company ('prayers (a) and (b)'). On 19 January 1996, the court heard the first petition and ordered that the company be wound-up and a liquidator appointed to administer the company. Having obtained the court orders thus, the respondent applied to strike out the said petition under O. 18 r. 19(1)(a), (b), (c) & (d) Rules of the High Court 1980. The application was allowed by the learned judge ruling, upon the authority of *Webb v. Stanfield*, that there could not be a case for oppressive conduct after a liquidator had taken over the affairs of the company. The appellant appealed and argued that the learned judge in the circumstances ought to have preferred and applied the authority of *Owen Sim Liang Khui v. Piasau Jaya,* or *Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors And Other Appeals,* to that of *Webb v. Stanfield*. The primary issue that arose was whether the said petition could be allowed to remain in view of the fact that a winding-up order had been granted to wind-up the company.

Held:

Per Richard Malanjum JCA (majority)

[1] *Owen Sim* was not dealing with a petition related to a company that was being wound-up. Hence, it did not answer the primary issue at hand. In that case the court was only faced with an application made under O. 18 r. 19 to strike out a petition filed under s. 181 of the Act. But unlike the present case the company therein was still a going concern. The case, thus, is not of much help to the appellant. (p 454 h)

[1a] *Kumagai Gumi Co Ltd* likewise is not an authority to say that relief can still be granted under an oppression petition despite a company being wound-up. In that case, as was in *Webb v. Stanfield*, the oppression petition and the winding-up petition were heard together. Yet the appellate court took the view that the relief prayed for in the oppression application could no longer be entertained following the granting of the winding-up order. In the present case, the position was worse off since the said petition was not even set down for hearing when the winding-up order was granted. Clearly, *Kumagai Gumi Co Ltd* has to be read in the contexts and events of that case, including the fact that in that case it was only a provisional liquidator that was appointed before the hearing of the petitions and not a liquidator appointed following the granting of a winding-up order. (p 455 c-g)

[2] In the circumstances, we were inclined to accept the proposition of law as expounded in *Webb v. Stanfield*. In other words, since a winding up order has already been granted to wind-up the company with a liquidator appointed, the complaints of the appellant of oppressive acts and such other acts couched under s. 181 of the Act and as contained in the said petition could no longer be sustained. The appointment of the liquidator, indeed, has a bearing on the fate of the said petition. (pp 455 h & 456 b)

[3] Whilst it may be true that the Federal Court in *Owen Sim* has opined that the wording of s. 181 of the Act has a wider implication when compared with similar provisions in Australia and United Kingdom, or that s. 181 may still bite notwithstanding that the act complained of is a single act or omission if the devastating or far-reaching effect or effects of such a single act or omission persist at the date of the presentation of the petition, such opinion is no answer to a company against whom a winding-up order has been granted. The learned judge below was therefore correct in his conclusion that it cannot be said that the effect or effects of an oppressive act or acts complained of would continue to subsist upon the granting of a winding-up order of a company followed by an appointment of a liquidator. (pp 456 g-h & 457 a-e)

[4] The said petition could also not be maintained by virtue of s. 223 of the Act. This section clearly prohibits any disposition of the property of the company upon a winding-up, and that being so, prayers (a) and (b) of the said petition cannot be entertained unless sanctioned by the court. (p 458 a-c)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu dan responden pertama telah menubuhkan sebuah syarikat usahasama di mana kedua-dua mereka memegang ekuiti pegangan saham yang sama banyak ('syarikat'). Ekoran pertelingkahan yang berbangkit di antara mereka, responden pada 18 Oktober 1995 telah memfail petisyen di bawah s. 218(1)(i) Akta Syarikat 1965 ('Akta') bagi menggulung syarikat ('petisyen pertama'). Berikutnya, pada 16 Januari 1996, perayu pula memfailkan petisyen di bawah s. 181 Akta ('petisyen tersebut'), menuntut beberapa relif serta perintah bahawa responden membeli saham-saham syarikat yang dipegang oleh perayu ('permohonan (a) dan (b)'). Pada 19 Januari 1996 mahkamah telah mendengar petisyen pertama dan memerintahkan supaya syarikat digulung dan penyelesai dilantik bagi menguruskannya. Dengan perintah-perintah mahkamah tersebut berada ditangannya, responden memohon untuk mengetepikan petisyen tersebut di bawah A. 18 k. 19(1)(a), (b), (c) & (d) Kaedah-kaedah Mahkamah Tinggi 1980. Permohonan responden dibenarkan oleh hakim yang bijaksana yang memutuskan, atas autoriti *Webb v. Stanfield*, bahawa perbuatan menindas tidak boleh wujud selepas halehwal syarikat telah diambilalih oleh penyelesai. Perayu merayu dan berhujah bahawa hakim yang bijaksana dalam halkeadaan yang wujud tidak seharusnya menggunapakai autoriti *Webb v. Stanfield*, sebaliknya harus mengutamakan dan memakai autoriti *Owen Sim Liang Khui lwn Piasau*, atau pun *Kumagai Gumi Co Ltd lwn. Zenecon Pte Ltd & Ors*. Isu utama yang timbul ialah sama ada petisyen tersebut boleh dibenarkan untuk terus wujud setelah perintah penggulungan untuk menggulung syarikat dikeluarkan.

Diputuskan:
Oleh Richard Malanjum HMR (majoriti)

[1] *Owen Sim* tidak membicarakan petisyen berkaitan syarikat yang sudah pun digulung. Oleh itu, ia tidak menjawab isu utama di sini. Dalam kes tersebut mahkamah berhadapan dengan satu permohonan di bawah A. 18 k. 19 untuk mengetepikan petisyen yang difailkan di bawah s. 181 Akta. Namun, berlainan dengan kes semasa, syarikat dalam kes tersebut masih utuh dan beroperasi. Oleh yang demikian kes tersebut tidak banyak membantu perayu.

[1a] *Kumagai Gumi Co Ltd* juga bukan merupakan autoriti untuk mengatakan bahawa relif masih boleh diberikan walaupun sesebuah syarikat itu sudah digulung. Dalam kes tersebut, sepertimana juga *Webb v. Stanfield*, petisyen penindasan dan petisyen penggulungan didengar bersekali. Walaupun begitu mahkamah rayuan mengambil pandangan bahawa relif seperti yang dipohon dalam petisyen penindasan tidak boleh diberi setelah perintah penggulungan dibuat. Dalam kes semasa, kedudukannya adalah jauh lebih buruk oleh kerana petisyen tersebut belum pun ditetapkan untuk pendengaran sewaktu perintah penggulungan dibuat. Jelas bahawa *Kumagai Gumi Co Ltd* harus dilihat dalam konteks fakta-faktanya yang tersendiri, termasuk fakta bahawa dalam kes tersebut yang dilantik hanyalah penyelesai sementara, itu pun sebelum petisyen-petisyen didengar, dan bukannya seorang penyelesai selepas perintah penggulungan dibuat.

[2] Dalam halkeadaan sedemikian, kami lebih condong untuk menerima proposisi undang-undang sepertimana yang diutarakan dalam *Webb v. Stanfield*. Dengan perkataan lain, oleh kerana suatu perintah penggulungan sudah pun dibuat untuk menggulung syarikat dan penyelesai pula sudah dilantik, maka aduan-aduan perayu berkenaan perbuatan-perbuatan menindas dan perbuatan-perbuatan lain yang dirangkum di bawah s. 181 Akta serta apa-apa yang dikatakan di dalam petisyen tersebut sudah tidak lagi boleh dipertahankan. Tidak dapat dinafikan bahawa perlantikan penyelesai di sini sememangnya mempengaruhi nasib petisyen tersebut.

[3] Sementara ianya mungkin benar bahawa Mahkamah Persekutuan di dalam *Owen Sim* menyuarakan pendapat bahawa s. 181 Akta mempunyai implikasi yang lebih luas berbanding peruntukan yang sama di Australia atau United Kingdom, ataupun bahawa s. 181 masih boleh terpakai walaupun perbuatan yang diadukan itu merupakan satu perbuatan atau peninggalan tunggal sekiranya kesan atau kesan-kesan buruk atau berpanjangan perbuatan atau peninggalan tunggal tersebut masih wujud semasa penyerahan petisyen, pendapat sedemikian bukanlah jawapan kepada sebuah syarikat di mana suatu perintah penggulungan sudah pun dikeluarkan terhadapnya. Oleh yang demikian, hakim yang bijaksana di bawah adalah betul bilamana memutuskan bahawa kesan atau kesan-kesan perbuatan atau perbuatan-perbuatan menindas yang dikatakan itu tidak lagi boleh dianggap sebagai masih terus wujud sebaik sahaja perintah penggulungan dibuat dan penyelesai dilantik.

[4] Petisyen tersebut juga tidak boleh dipertahankan mengambilkira peruntukan s. 223 Akta. Seksyen ini jelas melarang mana-mana pelupusan harta syarikat sewaktu penggulungan, dan atas alasan ini, permohonan (a) dan (b) tidak boleh dilayan kecuali jika dipersetujui oleh mahkamah.

Rayuan ditolak.]

Case(s) referred to:
Fargo Ltd v. Godfroy [1986] 1 WLR 1134 Ch D ***(foll)***
Ferguson v. Wallbridge [1935] 3 DLR 66 PC ***(foll)***
Kumagai Gumi Co Ltd v. Zenecon Pte Ltd & Ors And Other Appeals [1995] 2 SLR 297 CA ***(dist)***
Majumder v. Attorney General of Sarawak [1967] 1 MLJ 101 FC ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya [1996] 4 CLJ 716 FC ***(dist)***
Webb v. Stanfield [1990] 8 ACLC 715 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 181, 218(1)(i), 223

Companies Code [Queensland], ss. 181, 320(1)(a), 368(1)

For the appellant - Leong Wai Hong (Loo Peh Fern); M/s Skrine & Co
For the respondent - Balvinder Singh; M/s Sri Ram & Co

Reported by WA Sharif

JUDGMENT

Richard Malanjum JCA:

Introduction

On 31 January 2003 by majority (Dato' Abdul Hamid Mohamad JCA and Datuk Richard Malanjum JCA) with Dato'Abdul Kadir Sulaiman JCA dissenting, we dismissed the appeal of the appellant.

The appellant was appealing against the decision of the High Court given on 31 March 1997 with postscript dated 30 May 1997 allowing the application of the 1st, 2nd and 3rd respondents to strike out the petition of the appellant (the said petition) filed pursuant to s. 181 of the Companies Act 1965 (the Act) in respect of a joint venture company called the "Trans-Pacific Hotels Sdn. Bhd" ('the said company') set up by the appellant and the 1st respondent on equal equity shareholding.

It was not in dispute that on 18 October 1995 the 1st respondent filed a winding up petition ('the first petition') of the said company pursuant to s. 218(1)(I) of the Act.

On 16 January 1996 the appellant filed the said petition seeking for various reliefs, namely:

> (1) (a) that the 1st Respondent be ordered to purchase the Petitioner's 10,000 shares in the Company at a price of RM7,998,000.00;

(b) alternatively, that the 1st Respondent be ordered to purchase the Petitioner's 10,000 shares in the Company at a fair value, taking into account the projected future income from the three Hotel Management Contracts, to be assessed by a firm of independent auditors, and that directions be given as to:

(i) the date at which such fair value is to be assessed; and

(ii) the basis on which such fair value is to be assessed.

(2) that the 2nd, 3rd and 4th Respondents be ordered to pay to the Company and/or Petitioner the sum of (RM7,998,000 x 2) or damages to be assessed with interest at 8% per annum or such rate this Court deems fit from a date this Court deems fit to date of full payment;

(3) that a civil action be brought in the name of the Company against the 2nd, 3rd and 4th Respondents for breaches of fiduciary duties, section 132 (1) and section 132 (c) (1) of the Malaysian Companies Act;

(4) that the 1st, 2nd, 3rd and 4th Respondents effect the appointment as directors of the Company two persons nominated by the Petitioner within 7 days from the date of this Order;

(5) the 4th Respondent tenders his resignation as a director of the Company within 7 days from the date of this order;

(6) that the 1st, 2nd and 3rd Respondents remove the 4th Respondent as a director of the Company within 7 days from the date of this Order;

(7) further and/or alternatively, such other order as this Honourable Court deems fit;

(8) that the costs of this application be paid to the Petitioner by the 1st, 2nd, 3rd and 4th Respondents.

On 19 January 1996 the first petition was heard with the winding up order being granted.

Thereafter, on 26 March 1996 the 1st, 2nd and 3rd respondents filed a summons in chambers (encl. 18) seeking for the following orders, namely:

1. that the Petition dated 16.1.1996 be struck out pursuant to Order 18 Rule 19(i)(a), (b), (c) and (d) of the Rules of the High Court 1980;

2. that the costs of and arising out of this application be paid by the Petitioner to the 1st, 2nd and 3rd Respondents;

3. such further and other orders as this Honourable Court deems fit.

That summons in chambers was heard before the senior assistant registrar who dismissed it. The respondents appealed to the judge in chambers who heard the appeal and allowed it thereby effectively striking out the said petition as against the 1st, 2nd and 3rd respondents.

Brief Factual Background

It was common ground that the appellant and the 1st respondent agreed to form a joint venture company intended to go into hotel management services. A joint venture agreement was therefore entered into by the parties and subsequently the said company was incorporated with the parties having equal equity shareholdings. As directors of the said company the 1st respondent nominated as its nominees the 2nd and 3rd respondents while the appellant nominated the 4th respondent.

On 23 November 1991 the appellant executed a Management Support Services agreement with the said company to provide management support and other services in connection with the hotel operation and management business of the said company.

The said company then entered into three Hotel Management Contracts with three hotel owners and/or operators of hotels, namely, 'The Residence' of Kuala Lumpur, 'Pangkor Laut Resorts' at Pangkor Laut Perak and 'The Henrick' in Kuala Lumpur.

The arrangement of the parties did not work out well as intended. There was firstly the removal of the 4th respondent by the appellant as its President and Chief Executive Officer followed by his resignation as a director of the appellant. However the 4th respondent remained with the said company. That was not welcomed by the appellant which went on to seek for his removal by the said company.

There were then discussions between the appellant and the 1st respondent on the future of the business venture of the said company in view of the resignation of the 4th respondent as a director of the appellant. However while figures were being worked out on the values of the shares of the said company the 1st respondent informed the appellant that the Management Support Services Agreement and the three Hotel Management Contracts had been terminated by the parties thereto. The appellant did not accept the decision to terminate those agreements.

In the interim and on the basis of the termination of those agreements the first petition was filed by the 1st respondent.

Subsequent Events

As stated earlier, three days after the said petition was filed the first petition was heard and the result was that the said company was ordered to be wound up. There was no appeal lodged by any party against the winding up order.

Subsequently the application by the respondents to strike out the said petition came up for hearing before the senior assistant registrar and then an appeal to the judge in chambers. In his grounds of judgment dated 11 April 1997 the learned judge in the court below when coming to his decision understood as a fact that the said petition was filed after the winding up order was made. However that was later on corrected by the solicitors for the appellant upon receipt of the grounds of judgment. That prompted the learned judge to issue a postscript dated 30 May 1997. But there was no reversal of his decision that he made earlier on.

This is how the learned judge responded to the situation:

> Had I not made the error, what I would have to consider was a case where the position of an oppression petition, although presented before a company had been ordered to be wound up, came to be considered after the company had been ordered to be wound up. *Webb v. Stanfield* was such a case, and the question would still remain whether there could be a case for oppressive conduct after a liquidator has taken over the affairs of a company following a winding-up order.
>
> HIH's solicitors have requested that I review my decision in view of the error, which they say, citing authorities, I am not precluded from doing.
>
> I do not feel it would be right for me to do so, even if I were not precluded from doing so, as the defendant's counsel might still wish to argue on the appeal that, on a broader view of *Webb v. Stanfield* and the authorities cited therein, or for some other reasons, I was right to strike out the oppression petition. I feel I ought to let my decision remain for the Court of Appeal to finally adjudicate upon.

Hence, effectively nothing came out of that postscript as to warrant any objection that there were two judgments in this case.

The Grounds Of Appeal And Contentions

The gist of the complaint of the appellant was that there was no justification in allowing the striking out application of the respondent since there were factual disputes, that the learned judge made a wrong finding of fact, that the respondent did not come to court with 'clean hands' and that it was an error

to prefer the decision in *Webb v. Stanfield* [1990] 8 ACLC 715 in view of the Federal Court decision in *Owen Sim Liang Khui v. Piasau Jaya* [1996] 4 CLJ 716.

In his submission learned counsel for the appellant contended *inter alia* that s. 181 of the Act is wider than the equivalent provisions in Australia and United Kingdom. He therefore argued that the decision in *Webb v. Stanfield (supra)* should not be adopted in Malaysia in view of the decision in *Owen Sim (supra)* which propounded that an oppressive act or acts might have ceased but if the effect or effects remained then that would be within the ambit of s. 181.

In reply learned counsel for the respondent submitted, *inter alia*, that the time of filing of the said petition was not important. The crucial issue is that a winding up order has been granted to wind up the said company. He also referred to s. 223 of the Act which prohibits the transfer of shares of a company on being wound up. And it was further contended that to allow the said petition to remain would disregard the presence of the liquidator who was appointed upon the winding up of the said company being granted. Another point raised was that upon winding up of the said company the shareholders became mere contributories. Thus s. 181 would no longer be relevant.

Findings

In coming to our decision as we did, we accepted the fact that the said petition was filed before the winding up order of the said company was granted. We also noted the fact that the said petition was filed pursuant to s. 181 of the Act. And of importance is the fact that the said company is now being administered by a liquidator appointed upon the granting of the winding up order.

Accordingly, the issue that confronted us and the learned judge in the court below was whether the said petition should be allowed to remain in view of the fact that a winding up order has been granted to wind up the said company. Indeed we think that this is a preliminary point and which the appellant should surmount before it can go any further with the said petition. And our task was made difficult with the admission of learned counsel for the parties of the absence of judicial authority addressing directly on the point. We were therefore urged, as was the learned judge in the court below, to consider the decisions in *Webb v. Stanfield (supra)* on the one hand and *Owen Sim (supra)* and *Kumagai Gumi Co. Ltd v. Zenecon Pte Ltd & Ors and Other Appeals* [1995] 2 SLR 297 (CA) on the other.

Now briefly, in *Webb v. Stanfield (supra)* the fact was that Webb and Stanfield had a business together under a company called Webb and Stanfield Associates Plc. However Webb was not happy in that Stanfield had allegedly started another company in competition with their business. So Webb applied for certain orders under s. 320 of the Companies (Queensland) Code, an equivalent to our s. 181 of the Act. In turn Stanfield applied for the winding up order of their company on the ground of insolvency. At the direction stage of the application of Webb the learned judge heard together the applications of the parties with the result that Webb's application was dismissed while Stanfield succeeded to obtain an order to wind up their company. On appeal by Webb the Supreme Court of Queensland dismissed it. And the court found that although the judge was in error for considering the merits of the case at the direction stage nevertheless the appellate court ruled that the result was correct.

It was one of the prayers of Webb that Stanfield purchased his shares in their company. However the appellate court held that since the company was being wound up s. 368(1) of the Companies Code prohibited the transfer of shares in such a situation.

It was further held by the appellate court that even if s. 368(1) could be overcome, s. 320(1)(a) would no longer be applicable because the company's affairs were already in the hands of the liquidator and thus it would be impossible for Webb to prove that the affairs of the company 'are being conducted' in oppressive manner. Moreover the appellate court was also of the view that the acts of Stanfield that were complained of did not fall within the terms of s. 320(1)(a) (iv) of the Companies Code as therein referred to acts 'by and on behalf of the company'.

For the appellant reliance was placed upon the cases of *Kumagai Gumi Co. Ltd v. Zenecon Pte Ltd & Ors and Other Appeals (supra)* and the decision of our Federal Court in *Owen Sim (supra)*. It was the submission of learned counsel for the appellant that the granting of the winding up order should not bar the appellant from pursuing other reliefs against the respondents under the said petition.

Unfortunately *Owen Sim* was not dealing with a petition related to a company that was being wound up. Hence it did not answer the primary issue at hand. In that case the court was only faced with an application made under O. 18 r. 19 of the Rules of the High Court 1980 to strike out a petition filed under s. 181 of the Act. But unlike the present case there the company was still a going concern. Thus we do not think that case is of much help to the appellant on this primary issue.

In respect of *Kumagai Gumi Co. Ltd v. Zenecon Pte Ltd & Ors and Other Appeals (supra)* the reliefs prayed for under an oppression petition filed, inclusive of an order to wind up the companies concerned, were granted although there was also a winding up petition presented which the trial court finally did not grant in view of its findings and orders made under the oppression petition. The Singapore Court of Appeal, while disallowing in parts the findings and orders made by the trial court, generally approved the approach taken.

But we do not think *Kumagai Gumi Co. Ltd v. Zenecon Pte Ltd & Ors and Other Appeals (supra)* is an authority to say that relief can still be granted under an oppression petition despite a company being wound up. In that case the oppression petition and the winding up petition were heard together. In fact even in *Webb v. Stanfield (supra)* the two applications were heard together. Yet the appellate court took the view that the reliefs prayed for in the oppression application could no longer be entertained following the granting of the winding up order. In the present case the position was worse off since the said Petition was not even set down for hearing when the winding up order was granted.

The learned appellate judge in *Kumagai Gumi Co. Ltd v. Zenecon Pte Ltd & Ors and Other Appeals (supra)* also said this:

> But the appointment of liquidators is no bar to other reliefs, if appropriate. It depends on the facts of the particular case, and the orders to be made by the court (subject to the limitation we have discussed) are ultimately discretionary. per LP Thean JA at page 319.

In our view however the foregoing statements have to be read in the context of the facts and events of that case, in particular, the fact that the petitions were heard together and the decision of the trial Judge to grant the reliefs prayed for under the oppression petition whilst dismissing the winding up petition. Further, in that case it was only a provisional liquidator that was appointed before the hearing of the petitions and not a liquidator appointed following the granting of a winding up order.

Now, having considered the contentions of learned counsel for the parties and the authorities cited, by majority, we were inclined to accept the proposition of law as expounded in *Webb v. Stanfield (supra)*. In other words, since a winding up order has already been granted to wind up the said company with a liquidator appointed, the complaints of the appellant of oppressive acts and such other acts couched under s. 181 of the Act and as contained in the said petition could no longer be sustained. In *Webb v. Stanfield (supra)* this is what the appellate court said at p. 719:

> But to admit that the proceedings by the applicant under sec. 320 may continue unabated is to ignore the fact that the company is presently in the process of being wound up under an order of this Court that remains unchallenged.

Indeed in our view the appointment of the liquidator has a bearing on the fate of the said petition. And that appeared to be the view expressed in some cases in other common law jurisdictions. In *Fargo Ltd. v. Godfroy* [1986] 1 WLR 1134 Ch. D Walton J said this at p. 1136:

> … But once the company goes into liquidation the situation is completely changed, because one no longer has a board, or indeed a shareholders' meeting, which is in any sense in control of the activities of the company of any description, let alone its litigation. Here, what has happened is that the liquidator is now the person in whom that right is vested.

And in *Ferguson v. Wallbridge* [1935] 3 DLR 66 PC Lord Blanesburgh discussed the issue in this way at pp. 82-83:

> The question next arises whether they are also right in their further contention that this claim cannot be maintained or prosecuted in an action constituted as the appellant's action is. And, as the company is no party to that action, the answer must, their Lordships' think, clearly be in the negative. But assuming that by amendment the company were to be added as respondent, the Board, let it also be assumed, having power to direct such an amendment to be made, could the appeal then be maintained? This is the real question, and quite clearly, in their Lordships' judgment, it could have been so maintained if the company were not in liquidation. ... But could it be so maintained now that the company is assumed to be in liquidation? And the answer must again, as their Lordships think, be in the negative.

In coming to our conclusion we were aware of the argument that in *Owen Sim (supra)* it was the opinion of the Federal Court that in view of the wordings in s. 181 of the Act it has a wider implication when compared with similar provisions in Australia and United Kingdom. This is how the Federal Court expressed its view on that issue:

> Now, it is inaccurate to state as a proposition of law that because of the present tense of the language appearing in s. 181(1)(a), the oppression complained of must in every case continue right up to the date of the presentation of the petition. Indeed, Lord Wilberforce himself recognized this when he referred to a last minute correction as not having the effect of avoiding an inference of a propensity to oppress. But the reference by his Lordship to a last minute correction is but a mere illustration of a much wider principle. It is this.

> Paragraph (a) to the first sub-section of s 181 is not, as observed by Lord Wilberforce, directed at specific or particular acts or omissions. It is directed at the nature of the conduct complained of. And where attention is called to particular acts or omissions, it is the effect of these which has to be considered. It is not and has never been the law that the section does not bite where what is complained of is but a single act or omission on the part of the wrongdoer.
>
> A single act or omission may, by its very nature, have so devastating or far-reaching a consequence upon the rights of a member that its effects may be permanently felt. For the purposes of s. 181(1)(a), it is sufficient that the effects of a single act or omission are such that they persist at the date of the presentation of the petition. It is no answer, in those circumstances, for the perpetrators of the act or omission to allege that there was no continuous oppressive conduct up to the date of presentation of the petition. per Gopal Sri Ram JCA at page 129.

Whilst we are clear of the opinion of the Federal Court, unfortunately it is no answer to a company wherein a winding up order has been granted, as in the instant case, with a liquidator having been appointed. We are therefore substantially in agreement with the view of the learned judge in the court below that it cannot be said that the effect or effects of an oppressive act or acts complained of would continue to subsist upon the granting of a winding up order of a company and followed by an appointment of a liquidator. From that point in time it is the liquidator who is running the affairs of the company. It should therefore be opened to the aggrieved party to bring his complaint to the liquidator without having to resort to s. 181 of the Act. In any event and as found by the learned judge in the court below that in the instant case it was never the contention of the appellant that the liquidator appointed had allowed either the oppressive act or acts or its effect or their effects to subsist. Indeed in *Webb v. Stanfield (supra)* the appellate court said this at p. 719:

> Paragraph (a) of subsection speaks of a member who believes (i) that the *"affairs of the company are being conducted in a manner that is oppressive …" to him. The "affairs of the company", in so far as they exist at all in a winding up, are now being conducted by a liquidator, who is an officer of the Court.* ... It is impossible to sustain a rational belief that the liquidator now in control of the company is conducting those affairs in a manner that is in any way oppressive to the applicant in this matter. If he were found to be doing so, the appropriate remedy would be to apply to the Court for directions to be given that the liquidator discontinue such conduct. (emphasis added).

Another compelling reason in our view why the said petition could no longer be maintained after the granting of the winding up order of the said Company and the appointment of a liquidator is the provision of s. 223 of the Act. The section reads:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

Thus in view of this prohibition, prayers (a) and (b) of the said petition cannot be entertained unless sanctioned by the court. That was also the issue that prompted the appellate court in *Webb v. Stanfield (supra)* to agree with the final conclusion of the court below. Further, in the instant case there was another obstacle in that the liquidator was not substituted for or added as a party in the said petition. (See: *Ferguson v. Wallbridge (supra)*). It would then be quite difficult to bind the liquidator in respect of an order made on the sales of shares of the said Company as prayed for in the said petition. (See: *Majumder v. Attorney General of Sarawak* [1967] 1 MLJ 101 FC).

We have also considered the other arguments of the parties but we do not think we should deal with them in any detail as whatever our findings on them would not materially affect the conclusions that we have, by majority, arrived.

For the reasons above by majority, we dismissed the appeal of the appellant with costs.

My learned brother YA Dato' Abdul Hamid bin Mohamed JCA has read this judgment in draft and expressed his agreement and the reasons therefor.